

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 164 of 1991
with
CRIMINAL APPEAL No.157 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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GANDAJI KESHAJI THAKOR & 17 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

Criminal Appeal No.164 of 1991:

MR RC JANI for Appellant(s) : 1, None for Appellant(s) : None for
Petitioner No(s).: for Appellant(s) : 2 - 18.
MR.A.J. DESAI, ADDL. PUBLIC PROSECUTOR for Opponent.

Criminal Appeal No.157 of 1991:

Mr.M.C. Barot, Senior Counsel with Mr.Hriday Buch for appellants.
MR.A.J. DESAI, ADDL. PUBLIC PROSECUTOR for Opponent.

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 06/09/2006

COMMON ORAL JUDGMENT

In the urgent Final Hearing Board of this Court, Criminal Appeal No.164 of 1991 arising from Sessions Case No.159 of 1989 is notified. Taking into consideration the age of the appeal, after completion of the admission board, the matter was taken up for hearing. While the Court was in the process of hearing of this appeal, it was pointed out by the learned advocate Mr.Hridya Buch that there is a cross appeal being Criminal Appeal No.157 of 1991. At his request, papers of that appeal were called for.

2. It is pointed out by the Court Sheristadar that earlier Criminal Appeal No.157 of 1991 arising from Sessions Case No.32 of 1991 was heard by this Court and after hearing the matter for some time when it had come to the notice of this Court on 29th April 2006, that as Additional Public Prosecutor in Criminal Appeal No.157 of 1991, 'I' had appeared, the Court had said "not before me".

3. The learned advocates appearing for the appellants in both these appeals and the learned Addl. Public Prosecutor, jointly requested that these appeals may be heard by this Court and they have 'no objection' if

these Criminal Appeals are heard by this Court. It was emphatically submitted that as 'I' had not appeared for any private party in the matter; and it was only as an APP that I had appeared in Criminal Appeal No.164 of 1991, the learned advocates have 'no objection' if the matters are decided by this Court. The learned advocates submitted that 'non hearing of these appeals' will further delay these matters. Even otherwise for about 'fifteen years' these matters are pending.

4. Taking into consideration the joint request of all the learned advocates including that of the learned APP, the Criminal Appeals are taken up for hearing.

In both these appeals, the incident is common. The appellants of Criminal Appeal No.157 of 1991 were posted at Village 'Abhrampura' having their Headquarters at Mehsana, as Mounted Head Constables for protection of 'crop' in the area. They were staying at 'Ramji Mandir' of the village. The posting was since 10th June 1989. They were armed with 303-rifles.

On 26/27th June 1989 they completed their night patrol returned to Ramji Mandir at 4.00 AM. At 06.30 AM one Prahlad K. Patel of Village Abhrampura came and

complained to them that from his farm, 'lachka bajri' is stolen and he is suspecting one 'Shivaji Suraji' for the same. The complainant (Prahlad K. Patel) was told that, 'they will inquire into the matter' but 'if he wants to file a complaint he will have to file the same at Vijapur'. AT about 01.30 PM on 27.06.1989 when the appellants went out of the temple to give grass to the horses, they saw Shivaji Suraji standing near a milk shop ('dudh ni dairy'). They called him inside the temple and made him sit. While it was being inquired about the complaint of theft of lachka bajri. The following persons armed with the weapons mentioned against each of them came in a crowd of about 50 persons, which was shouting.

Name of person	Armed with
Badarji, s/o Shivaji Suraji	Stick
Divanji Suraji	Stick
Mangaji Shivaji	Dharia
Takhaji Shivaji	Stick
Popatji Mansinghji	Dharia
Kadvaji Chaturji	Sword
Mansinghji Suraji, Jenaji Kodarji, Babuji Nanaji, Viraji Shivaji, Amrutji Kachraji, Lalaji Nanji, etc.	Stick
Bhikhiben Badarji, Hiraben Shivaji and the daughter of Shivaji	--

From amongst the crowd, Thakore Badarji Shivaji, Divanji Shivaji, Popatji Mansangji, Tabaji Shivaji, Mangaji Shivaji, Mansangji Suraji rushed into the temple and by

catching hold of Shivaji Suraji made him to stand up and started taking him out of the temple. The Police Constable, Rambadan Shukla (one of the appellants in Criminal Appeal No.157 of 1997) was also dragged along with his rifle, out of the temple. Outside the temple in the open ground, the crowd started beating him (Rambadan Shukla). At that time the complainant (another complainant-Tejaji Juhaji Thakore) went outside the temple and shouted that, 'leave him (Rambadan Shukla)'. On his shouting Popatji Mansangji came with dharia and assaulted the complainant, but he rescued himself with the help of rifle and the blow of dharia was received on the rifle. The said blow of dharia had fallen on the 'barrel portion' of the rifle. The members of the crowd made a heavy stoning, shouting that, 'the Policeman should be finished,' 'he should not escape today'. Tejaji hearing the shouts came towards 'Ramji temple' and to disperse the crowd fired two rounds, but the mob had not dispersed and 'Rambadan Shukla' was not freed. Having felt 'danger to the life' of (Shuklaji), fired three effective rounds. From amongst the members of the crowd, one Divanji Shivaji, Badarji Shivaji and Shivaji Suraji were injured. The crowd taking away the injured persons ran away. If the complainant had not resorted to the effective firing he and his companion Rambadan Shukla would have been killed by the crowd. Both of them sustained various injuries on the forehead, hand and

back. After the incident complainant (Tejaji Juhaji) and his companion (Rambadan Shukla) went to Vijapur by ST Bus for filing complaint at Vijapur Police Station. At Vijapur Police Station aforesaid offence was noted and registered.

5. For this incident, cross complaints are filed. In one complaint Police Constables, Tejaji Juhaji and his companion, Rambadan Shukla are the accused, whereas in the other complaint, Gandaji Keshaji Thakore along with 17 others are impleaded as accused.

After necessary formalities were completed, 'charge' was framed at Exh.32 in Sessions Case No.159 of 1989. The accused were read over and explained the charge, they denied the guilt and opted for trial. The case was committed to the sessions. The prosecution led the following evidence:

Exhibit No.	Nature of document
51	List of documents
52	Panchnama of scene of offence
53	Inquest Panchnama of deceased Badarji Shivaji
54	Panchnama and the clothes produced by Shivaji Suraji.
55	Report of registering offence

Exhibit No.	Nature of document
56	Panchnama of the clothes on the body of the deceased-Badarji Shivaji.
57	Postmortem note of Badarji Shivaji.
58	Medical papers of Shivaji Suraji.
59	Medical papers of Diwanji
60	Note sending Muddamal to Forensic Science Laboratory, forwarding report and analysis report and serologist's report.

All these documents were exhibited. The prosecution also examined the following witnesses:

Exh. No.	Name of the witness
64	Tejaji Juhaji, Police Constable
65	Complaint filed by Tejaji
68	Subhashbhai Harilal Dave, who has produced papers of exh.69 & 70.
71	Certificate of Diwanji Shivaji
72	Deposition of Rajendrabhai Thakkar
73	Police yadi
74	Certificate of Tejaji
75	Injury certificate of Rambadan
76	Deposition of Prahladbhai Kashiram Patel
77	Deposition of Sitaramdasji Guru Prasadji, Priest of the temple.
79	Deposition of Rambadan Shukla
80	Deposition of Parsottam Hargovan
81	Jamladbhai Mansuri
82	Deposition of Bhagabhai Umedbhai, who has produced Panchnama of weapons recovered from the accused, exh.83.
84	Deposition of Devusinh Darbar, who has produced the Panchnama of recovery of weapons-exh.85 to 88.
90	Examination of Investigating Officer.

6. The facts so far as posting of Tejaji Juhaji and Rambadan Shukla, Armed Police Constables at Village Abhrampura on 10th June 1989 in Mounting Branch for patrolling and protecting crop is concerned, it is not in dispute. Their stay at 'Ramji temple' in Village Abhrampura is concerned the same is also not in dispute. The fact that there are cross complaints filed, the incident having taken place on 27th June 1989 is also not disputed.

The only question which arises for consideration of this Court is whether, 'the two Police Constables acted in 'self defence' and while doing so whether they can be held guilty of an offence under section 304-Part II and section 326 of IPC. The learned Additional Sessions Judge, Mehsana has convicted them in Sessions Case No.32 of 1991 for offence punishable under section 304-Part II and section 326 of IPC and has awarded them five years rigorous imprisonment and fine of Rs.500 and in default, three months' simple imprisonment; whereas for offence under section 326 of IPC, four years rigorous imprisonment and fine of Rs.300/-, and in default two months' simple imprisonment.

The learned advocate Mr.M.C. Barot appearing with Mr.Buch emphatically submitted that this is a case

wherein the learned Judge ought to have believed that it was out of sheer frustration and as an attempt to save the life of the companion, who was in the midst of crowd of about 50 persons, the members of which were armed with deadly weapons like dharia and sword and all other members were armed with at least a stick and was being beaten and while so doing they were giving call to each other to finish the policeman, a member of Police Force armed with a rifle fired two rounds in the air and having found it to be ineffective fired three effective rounds. He cannot be said to have exceeded 'self defence'. It was only after he fired two rounds in the air to disperse the crowd and having found that the said firing is not effective he was left with no option than to make effective firing and he fired three rounds in which three persons were injured, of whom one has succumbed to injuries.

The learned senior advocate Mr.M.C. Barot invited attention of the Court to exhibit 91 (in Sessions Case No.159 of 1989), which pertains to the Panchnama wherein injuries sustained by Tejaji Juhaji, Armed Police Constable-the complainant are recorded. The Panchnama records that the injuries were sustained by said Shri Tejaji, on the left side on back portion of vest (Baniyan) there were blood stains. Said Shri Tejaji

Juhaji produced his rifle-303, there is an inscription on the butt reading '876'. On the barrel of that rifle, there are two cut marks caused by a sharp cutting weapon, whereas at one place there is 'Tincho' on the wooden part of the barrel. Thirdly, it is recorded that the wooden part of the barrel is cut, and there iron part is visible.

Mr.Barot, the learned senior advocate submitted that from the condition of the rifle one can appreciate what imminent danger/ apprehension Tejaji Juhaji-complainant must have experienced. In light of that the act of Tejaji Juhaji of resorting to firing is to be viewed as an act of self defence. He submitted that the fact of Tejaji having not sustained deadly injuries is of no significance and the same cannot be considered to come to a conclusion that there was no imminent danger/ apprehension to the life of his companion, Rambadan Shukla also. Mr.Barot, learned senior advocate emphatically submitted and requested that the Court may try to visualise the mental frame of a person whose companion is caught hold by a mob of about 50 persons armed with dharia, sword, iron pipe and sticks and is being beaten with shouts that 'finish this policeman' and 'do not let him go', not getting dispersed even after firing is made in the air, who himself is attacked with

sharp cutting weapon which he was able to avoid only because with the help of his rifle on which marks of assault are visible on the barrel part of the rifle. In such a situation resorting to effective firing whether can be said to be a bona fide exercise of 'self defence'. He submitted that it is true that three persons sustained injuries and of them one succumbed to injuries but then if he had not opted for effective firing he would not have been available for facing the trial.

7. Mr.Barot, the learned senior counsel submitted that it is not the case of any of the injured persons that 'Tejaji Juhaji' and 'Rambadan Shukla' had any enmity with these persons. When there was no enmity there was no reason for Tejaji to resort to firing, that too in a manner by which a person is killed. He submitted that it is not in dispute that these two Police personnel were posted at Village Abhrampura only on 10th June 1989 and within a short time-less than month on 27th June 1989 the incident took place. He submitted that the say of Tejaji and his companion, 'Rambadan Shukla' is not so improbable that it is worth accepting. He submitted that as against that the case put forward by the other side is such that it is difficult to believe the same.

Learned advocate Mr.Barot submitted that Tejaji and his

companion-members of the Mounted Force being armed Police Constables were posted at Village Abhrampura on 10th June 1989. They had a duty to provide protection to the crops in the fields by having night patrol. On the night between 26-27 June 1989, they completed their patrolling duty and returned to the temple at 04.00 AM on 27th June 1989. At about 06.30 AM one Prahlad K. Patel came and complained about the theft of lachka bajri from his field. He also told that he suspected one Shivaji Suraji. The Police Constables told said Shri Prahlad K. Patel that they will inquire into the matter, but if he wants to file a complaint he will have to go to Vijapur.

Mr.Barot, learned senior advocate submitted that it is not the case of the prosecution that these Police Constables went hunting for said Shivaji Suraji and having found him, dragged him to the temple and that became the cause for the entire incident. On the contrary, the sequence of events shows that after said Shri Prahlad K. Patel complained at about 06.30 AM, nothing happened until 01.30 PM. It was only when they saw said Shivaji Suraji standing near milk dairy, near a neem tree, they called said Shivaji Suraji in the temple and started interrogating him. While they were interrogating, a mob of about 50 persons came, some of them armed with deadly weapons while rest with the

sticks. Of them some persons entered the temple and made Shivaji to stand up and started taking him out which was obstructed by Rambadan Shukla by catching hold of Shivaji, but then he too was dragged by those persons outside the temple. Taking Rambadan along with his rifle to the open ground outside the temple, the members of the crowd started beating him. Tejaji Juhaji-the complainant initially shouted to leave Rambadan Shukla. On hearing the shouts complainant Tejaji was attacked. He avoided the blow of dharia with the help of rifle. The rifle was damaged. The complainant-Tejaji then fired two rounds in the air, but the crowd did not disperse. Tejaji having felt the imminent danger to the life of his companion and also his own had to resort to effective firing. That resulted into injuries to three persons. One of them succumbed to injuries. It is the case of Tejaji that had he not resorted to the effective firing, the crowd not only would have killed Rambadan Shukla, but also the complainant-Tejaji.

8. Mr.Barot, the learned senior counsel submitted that medical evidence in this regard, i.e. injury certificate of Tejaji and his companion-Rambadan is quite natural. He submitted that even when a person is beaten by a crowd of 50 persons, it is not that every member takes an equal part in beating a person. Because 50 persons cannot

reach to a person when they are in a mob. But then the threat and the danger caused by the furious mood of the crowd cannot be ignored, more particularly in light of the fact of attack on the complainant which he could avoid by taking the blow on the rifle. He submitted that it is not in dispute that some members of the crowd were armed with dharia, sword, and iron pipe. Whereas, others were armed with sticks. He submitted that it is true that Tejaji and Rambadan had not sustained any injuries caused by any sharp cutting weapon but that by itself cannot be a ground to discard the case of the complainant-Tejaji. As submitted earlier, he felt imminent danger to the life of his companion and also of his own and therefore, he resorted to the effective firing in self defence. He submitted that judicial notice can be taken of the fact that feeling of danger and apprehension are subjective and there cannot be any admitted standards of such fear and apprehension. It is very likely that one may feel apprehended by merely seeing a crowd, which is armed with such deadly weapons, members of which are shouting that 'the Policeman must be finished' and that 'let the Policeman not go'. Whereas, one may not feel the same degree of apprehension, danger even when he is attacked by such a mob. The question is as to whether the apprehension felt by said Tejaji was so unreasonable that his act of effective firing will constitute the offence alleged against them.

The learned senior advocate, Mr.Barot also submitted that the learned Sessions Judge has not appreciated the evidence of the priest of the temple-Sitaram Bapu. He submitted that this witness was an independent witness and he had no axe to grind. His deposition was required to be appreciated in light of the facts which are material. He has narrated the incident in the same manner in which it is narrated by Tejaji Juhaji, the complainant. The learned advocate Mr.Barot submitted that by taking into consideration the factors for which the accused-Tejaji and Rambadan Shukla are not held guilty for the offence under section 302, similar test and similar factors ought to have been taken into consideration to hold that they are not guilty of offence even under section 304 Part II of IPC. The learned senior advocate, Mr.Barot submitted that the firing resorted to by Tejaji should be considered to be falling within the first part of section 97 which reads as under:

“Right of private defence of the body and of property - Every person has a right subject to the restrictions contained in Sc.99, to defend -

First - His own body, and the body of any other person against any offence affect the human body;

... .."

The learned senior advocate Mr.Barot submitted that as discussed hereinabove the 'act' was due to apprehension of 'death' or of 'grievous hurt' and this can be culled out from the submissions made hereinabove and that being so, the learned Judge ought not to have convicted them for the offence under section 304 Part II.

9. Mr.Barot, the learned senior advocate submitted that a judicial inquiry was ordered by the learned District Magistrate. The Sub-divisional Magistrate had inquired into the matter, he had visited the Village Abhrampura on 14.12.1989. This was done after giving necessary advertisement for the purpose. In this regard, the learned advocate invited the attention of the Court to the depositions of Diwanji Shivaji Thakore, exh.17 in Sessions Case No.159 of 1989, Manjuben, exh.21, deposition of Suvaji, exh.22 in Sessions Case No.32 of 1991. The learned senior advocate submitted that it is clear from the depositions that they have not participated in that inquiry and avoided the same. (emphasis supplied)

10. The learned senior advocate, Mr.Barot submitted that

in the complaint itself it is mentioned that, 'both the accused being members of the mounted force, were posted at Village Abhrampura for protection of crop for the last 20 (sic., 23) days and were staying in Ramji Mandir'. When the complaint was considered by the learned JMFC, a specific plea was raised by the learned advocate for the accused (Tejaji and Rambadan Shukla, Armed Police Constables) that, 'the accused are Government servants, and the alleged offence if at all can be said to have been committed, was committed while 'on duty' and therefore, before issuing 'process' necessary sanction under section 197 of the Code of Criminal Procedure is required to be taken from the Government, which is not taken by the complainant'. The learned senior advocate submitted that the learned JMFC did not focus his attention to the said argument.

11. So far as the appellants in Criminal Appeal No.164 of 1991 are concerned they are convicted for the offence under sections 147, 149, 323 and 332. They are awarded sentence of rigorous imprisonment for one year, for the offences under sections 147 and 149, fine of Rs.250/- in default, 3 months simple imprisonment. For the offence under section 323, they are awarded rigorous imprisonment of 6 months, fine of Rs.250/-, in default one month simple imprisonment and for offence under section 332,

rigorous imprisonment for 2 years, and fine of Rs.300/-, in default three months simple imprisonment. The learned Sessions Judge, Mehsana ordered all these sentences to run concurrently and the period for which the accused remained in Jail as under-trial prisoners be given set off.

12. Learned advocate Mr.Jani gave details of the period for which the accused have remained in Jail. He submitted that accused nos.1 to 11 were arrested on 28.06.1989; accused no.12 was arrested on 09.07.1989; accused nos.13 to 15 were arrested on 04.08.1989; accused no.16 was arrested on 07.08.1989; accused no.17 was arrested on 09.08.1989; accused no.18 was arrested on 10.08.1989.

He further submitted that different accused were released on different dates on bail.

Accused no.	Released on
9, 10 & 11	29.06.1989
2, 3, 4, 6 & 7	02.08.1989
14 & 15	04.08.1989
1, 5, 8, 16 & 17	16.10.1989
18	24.10.1989

From the aforesaid dates, the period for which they remained in Jail can be worked out. It works out as under:

Accused no.	Period remained in Jail	
	Months	Days
1	3	16
2	1	14
3	2	04
4	1	04
5	2	07
6	1	04
7	1	04
8	2	07
9, 10 & 11	-	01
14 & 15	-	01
16	2	09
17	1	04
18	2	14

Mr.Jani, learned advocate submits that accused nos.12 & 13 have undergone the sentences imposed.

13. Accused no.12 was arrested on 09.07.1989. He was not released on bail. Looking to the period of sentence he must have undergone the full sentence.

Accused no.13 was arrested on 04.08.1989. He was also not released on bail. Looking to the period of sentence he must have undergone the full sentence.

14. Taking into consideration the aforesaid submissions of the learned advocates and taking into consideration the overall facts of the case, this Court finds that the accused-appellants in Criminal Appeal No.157 of 1991 are not guilty of offence alleged against them. Their conviction recorded by the learned Additional Sessions Judge, Mehsana by judgement and order dated 14th March 1991 is hereby quashed and set aside.

15. As regards the appellants in Criminal Appeal No.164 of 1991, taking into consideration the long lapse of time and the fact that the accused no.12 and 13 have already undergone the entire sentence and other accused are on bail since long and no untoward incident is reported against them, this Court modifies the order of sentence qua these accused persons by curtailing the sentence to that of undergone. Both these appeals are accordingly disposed of. Criminal Appeal No.157 of 1991 is allowed and Criminal Appeal No.164 of 1991 is partly allowed.

(RAVI R. TRIPATHI, J.)